

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CAL FRUIT INTERNATIONAL, INC.,
Plaintiff,

NO. CIV. 04-2494 FCD/KJM

MEMORANDUM AND ORDER

JEANNE SPAICH; INTERNAL
REVENUE SERVICE;

Defendants.

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This matter is before the court on interpleader defendant Internal Revenue Service's ("IRS" or "the government") motion to strike¹ interpleader defendant Jeanne Spaich's ("Spaich") claim to the interplead funds pursuant to Federal Rule of Civil Procedure 37(d), and to disburse the funds at issue to the government.² In so moving, the government asks the court to

¹ Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

² The court treats the government's latter "request" as a (continued...)

1 impose the ultimate sanction of dismissal of Spaich's claim
2 because she twice failed to attend her properly noticed and
3 scheduled deposition.

4 **BACKGROUND**

5 Gavrillo Spaich, Jeanne's father, sold a load of prunes to
6 plaintiff Cal Fruit International, Inc. ("plaintiff"). The IRS
7 then levied plaintiff in September 2004 to collect the \$89,315.60
8 owed by plaintiff to CalPrune, a corporation owned by Gavrillo
9 Spaich, for the prunes. Rather than pay the IRS levy, plaintiff
10 filed this interpleader action, depositing said funds with the
11 court and seeking a determination as to who is entitled to the
12 funds. Specifically, plaintiff alleges that it does not know the
13 identity of the seller of the prunes, whether it was CalPrune
14 (Gavrillo Spaich) or Jeanne Spaich. Both the government and
15 Spaich filed claims to the interplead funds.

16 The government's claim arises from various federal tax
17 assessments against CalPrune. Spaich's claim, on the other hand,
18 arises from her allegation that she is the owner of the prunes
19 sold to plaintiff and that her father was merely acting as her
20 agent; therefore, she contends the funds should be distributed to
21 her rather than go to pay the IRS' tax levy.

22 The original deadline to complete discovery in this case was
23 October 28, 2005. (Pre-Trial Sch. Order, filed May 2, 2005.)
24 The government noticed Spaich's deposition for August 19, 2005,
25 after the parties mutually selected that date. On the day of the
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27 ²(...continued)
28 motion under Federal Rule of Civil Procedure 56.

1 deposition, however, Spaich inexplicably failed to appear.
2 Acknowledging her failure to provide adequate notice to the
3 government, her counsel reimbursed the government for its
4 expenses associated with the deposition.

5 Thereafter, Spaich's counsel communicated with the
6 government in an effort to resolve the matter short of any
7 further depositions. Spaich's counsel provided the government
8 with information regarding Spaich's position that all of the
9 relevant liabilities had been paid prior to the IRS' levy on the
10 subject funds and/or all such liabilities had been subsequently
11 paid. Spaich's counsel and the government's counsel engaged in a
12 series of e-mails on this issue. A resolution of the matter was
13 not reached, and the parties agreed to extend the discovery
14 deadline to November 30, 2005, which the court approved.
15 Spaich's deposition was then mutually scheduled for November 17,
16 2005. Yet, on the day of the deposition, she again failed to
17 appear, allegedly due to work commitments. Her counsel again
18 reimbursed the government its expenses.

19 **STANDARD**

20 Federal Rule of Civil Procedure 37(d) gives the court
21 discretion, if a party fails to attend a properly noticed
22 deposition, to sanction the party failing to appear for non-
23 compliance. See Fed. R. Civ. Proc. 37(b)(2)(A)-(C). Sanctions
24 include, but are not limited to: limiting evidence, closing
25 discovery, striking the pleadings, dismissing a claim, or entry
26 of a default judgment. Id.

27 Before dismissing a case for non-compliance with Rule 37,
28 the court must examine the following factors: (1) the public's

1 interest in the expeditious resolution of litigation; (2) the
2 court's docket concerns; (3) the risk of prejudice to the
3 defendant; (4) the judicial policy favoring disposition of cases
4 on the merits; and (5) the availability of a less drastic
5 sanction. Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir.
6 1997). Striking the claim is a severe penalty and should only be
7 assessed as a sanction in extreme circumstances, especially when
8 such a remedy is dispositive of the action. See Thompson v.
9 Housing Authority, 782 F.2d 829, 831 (9th Cir. 1986).

10 ANALYSIS

11 Upon consideration of the factors outlined above, the court
12 finds that Rule 37 sanctions, any one of which would have the
13 effect of entry of judgment in favor of the government, are not
14 merited at this time. The government requests dismissal because
15 Spaich twice failed to appear at her scheduled deposition. While
16 the government cites several cases where parties' claims were
17 stricken for failure to appear at depositions, those cases are
18 inapposite as they involve willful conduct in violation of direct
19 court orders to appear, after a nearly complete failure to
20 meaningfully participate in the discovery process. See Creative
21 Gifts, Inc., v. UFO, 235 F.3d 540, 544 (10th Cir. 2000);
22 Viswanathan v. Scotland County Bd. of Educ., 165 F.R.D. 50, 53-
23 54, aff'd 76 F.3d 377 (4th Cir. 1996); In re Sumitomo Copper
24 Litigation, 204 F.R.D. 58, 60-61 (S.D.N.Y. 2001). No such
25 "complete failure" of the discovery process has occurred here.

1 Plaintiff has not disobeyed direct court orders. She has,
2 however, failed to appear at two noticed depositions despite the
3 selection of a mutually convenient date and her counsel's
4 admonitions to appear. While wholly improper under the rules,
5 the court does not dismiss her claim to the subject funds.
6 First, it is noteworthy, that during this time, her counsel
7 sought to resolve the matter short of her deposition. Although
8 ultimately unsuccessful, such good faith efforts are relevant to
9 the court's consideration of this motion.

10 Additionally, while the court acknowledges that the
11 government was not required to seek a court order or other
12 sanctions prior to filing the instant motion, the court also
13 considers this fact in its analysis. Had the court previously
14 ordered her appearance, and she then failed to appear, the grant
15 of a Rule 37 motion would likely have been warranted.

16 Finally, the court considers the serious questions involved
17 in this case regarding who is entitled to the interplead funds
18 and in what amount. For instance, the government, in its initial
19 calculations asserted that the amount owed by CalPrune to the
20 government was more than \$550,000.00. Admitting error in that
21 first calculation, the government in a later correction filed
22 with the court, indicated the relevant amount was \$120,000.00.
23 (Praecipe to Gov't Reply, filed Jan. 6, 2006.) Spaich argues
24 that the amount owed is substantially less than \$120,000.00 and
25 indeed may be zero. In light of these significant issues, Spaich
26 should be given one last opportunity to appear at her deposition.

1 Therefore the court reopens discovery, which closed on
2 November 30, 2005, and orders Spaich's deposition. Said
3 deposition shall take place within 30 days of the date of this
4 order. The government shall have 45 days from the date of the
5 deposition to file a supplemental brief regarding its substantive
6 claim to the funds; Spaich shall have 20 days thereafter to file
7 a supplemental opposition; the government shall file any reply
8 within 10 days thereof. The court will set the matter for
9 hearing, if necessary, upon review of the supplemental briefs.

10 Spaich is admonished that this is her final opportunity to
11 appear for her deposition; if she does not appear, the court will
12 grant the government's motion to strike and pursuant thereto,
13 disburse the subject funds to the government.

14 CONCLUSION

15 For the foregoing reasons, the government's motion to strike
16 Spaich's interpleader claim is DENIED. However, as a result of
17 the court's ordering the deposition of Spaich, the court defers
18 ruling on the government's motion for disbursement of the
19 interplead funds. Plaintiff's motion for attorney's fees is
20 likewise deferred until this case is resolved on the merits, as
21 the imposition of attorney's fees against the interplead funds
22 depends on which interpleader defendant prevails. See Abex Corp.

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1 v. Ski's Ener., Inc., 748 F.2d 513, 516 (9th Cir. 1984).

2 IT IS SO ORDERED.

3 DATED: February 15, 2006

4 _____ /s/ Frank C. Damrell Jr.
5 FRANK C. DAMRELL, Jr.
6 UNITED STATES DISTRICT JUDGE
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